

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

STEPHEN McCULLOM, *et al.*,
Plaintiffs,

v.

BRAD LIVINGSTON, *et al.*,
Defendants.

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CIVIL ACTION NO. 3:12-CV-02037

DEFENDANT UTMB'S RESPONSE TO
PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY
AND AMENDED MOTION TO DISMISS

Comes now Defendant, the University of Texas Medical Branch, by and through its attorney, the Attorney General of Texas, and files this Defendant UTMB's Response To Plaintiffs' Notice of Supplemental Authority and Amended Motion To Dismiss. Defendant shows the Court the following:

1. Defendant denies that plaintiffs were disabled as defined by the Americans With Disabilities Act and the Rehabilitation Act.
2. The University of Texas Medical Branch – Correctional Managed Care (UTMB) provides medical care to Texas prison inmates in prisons in the southern and eastern parts of the state. Texas Tech University Health Sciences Center – Correctional Managed Care (Texas Tech) provides medical care to Texas prison inmates in prisons in the northern and western parts of the state. In the *Wright* case, the inmate was housed in a prison unit served by Texas Tech. In the present case, plaintiffs were in a unit served by UTMB.
3. In the *Wright* case, plaintiff alleges that the inmate was suicidal and that he should have been housed in a cell without a ceiling grate to which ligatures could be tied,

- and that he should have been housed with a cell mate. While Defendant Texas Tech disagrees with the facts as pled, defendant does understand plaintiff's allegation – the inmate should have been in a cell with no grate or with a cell mate.
4. In this case, plaintiffs allege that the inmates died because of extreme heat in the prison. Plaintiffs do not specify what they believe defendant UTMB should have done or not done about those conditions. Plaintiffs simply say the cell was too hot or was unsafe. Plaintiffs know from discovery that UTMB does not have any control over the temperature in the cells or buildings. Plaintiffs do not contend that UTMB caused or contributed to the temperatures in the prison, and UTMB does not have the authority to make cell changes or unit transfers unless medically indicated. Plaintiffs do not allege that the inmates' medical conditions met the criteria for a medical transfer, that their medical conditions were uncontrolled, ignored or mis-treated. Plaintiffs do not allege that the inmates' medications should have been changed or withheld, or that they were mis-diagnosed.
 5. UTMB cannot properly marshal its evidence or properly defend itself until it knows, specifically, how plaintiffs allege UTMB discriminated against the inmates *because of their alleged disabilities*, as required by the ADA and Rehabilitation Acts.
 6. In the *Wright* case, cited by plaintiffs, the plaintiff alleges that Texas Tech failed to ensure that the inmate took his medications related to his mental illness. The trial court granted defendant's Motion To Dismiss on that issue because plaintiff failed to state a *prima facie* case for violations of the ADA. See Exhibit 1 to Plaintiffs' Notice Of Supplemental Authority In Response To UTMB's Motion To Dismiss [65], at page 9.

7. Defendant requests that this court grant its Amended Motion To Dismiss for failure to state a prima facie case for violations of the ADA or Rehabilitation Act.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

DAVID C. MATTAX
Deputy Attorney General for
Defense Litigation

KAREN D. MATLOCK
Assistant Attorney General
Chief, Law Enforcement Defense Division

/s/KIM COOGAN
KIM COOGAN
Assistant Attorney General
State Bar No. 00783867
P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080/Fax (512) 495-9139

**ATTORNEYS FOR DEFENDANT
UNIVERSITY OF TEXAS MEDICAL
BRANCH**

NOTICE OF ELECTRONIC FILING

I, KIM COOGAN, Assistant Attorney General of Texas, certify that I have electronically submitted for filing **Defendant UTMB's Response to Plaintiffs' Notice of Supplemental Authority and Amended Motion to Dismiss** to the Court, on January 10, 2014 in the Northern District of Texas, Dallas Division.

/s/ KIM COOGAN
KIM COOGAN
Assistant Attorney General

CERTIFICATE OF SERVICE

I, KIM COOGAN, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the above and foregoing **Defendant UTMB's Response to Plaintiffs' Notice of Supplemental Authority and Amended Motion to Dismiss** has been served by placing same in the United States Mail on this the 10th day of January, 2014, addressed to:

Jeff Edwards
Scott Medlock
The Edwards Law Firm
1101 E. 11th Street
Austin, Texas 78702

Bruce R. Garcia
Office of the Attorney General
P. O. Box 12548, Capitol Station
Austin, Texas 78711

Via Hand-Delivery

Johnathan Stone
Office of the Attorney General
P. O. Box 12548, Capitol Station
Austin, Texas 78711

Via Hand-Delivery

Demetri Anastasiadis
Office of the Attorney General

Via Hand-Delivery

P. O. Box 12548, Capitol Station
Austin, Texas 78711

/s/KIM COOGAN
KIM COOGAN
Assistant Attorney General